In the Supreme Court

of the United States

OCTOBER TERM, 1976

No. 76-1368

PACIFIC POWER & LIGHT COMPANY,
Appellant,

v.

THE DEPARTMENT OF REVENUE OF THE STATE OF MONTANA,
Appellee.

Appeal from the Supreme Court of the State of Montana

JURISDICTIONAL STATEMENT

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STEVENS-NESS LAW PUB. CO., PORTLAND, ORE. 3-77

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THE DEPARTMENT OF REVENUE OF THE STATE OF MONTANA,
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Appeal from the Supreme Court of the State of Montana

JURISDICTIONAL STATEMENT

OPINIONS BELOW

The opinion of the Supreme Court of the State of Montana is reported at 558 P.2d 454 (Mont. 1976), *reh. den.* (1977). The Findings of Fact and Conclusions of Law of the Montana District Court in and for the County of Lewis and Clark and the Findings of Fact and Conclusions of Law of the Montana State Tax Appeal Board are not recorded. Copies of these opinions are appended hereto.

JURISDICTION

This is an appeal pursuant to 28 U.S.C. § 1257 (2) which draws into question appellee's application of 5 R.C.M. § 84-905 (Supp. 1976) as being in violation of the United States Constitution.

The Opinion of the Supreme Court of the State of Montana was dated and entered December 29, 1976. An Order denying appellant's Petition for Rehearing was dated and entered January 27, 1977. Timely notice of appeal to this Court was filed with the Clerk of the District Court of the First Judicial District of the State of Montana in and for the County of Lewis and Clark, the court possessed of the record, on March 21, 1977.

This Court's jurisdiction is sustained by *Dahnke-Walker Miller Co.* v. *Bondurant*, 257 U.S. 282 (1921) and *American Oil* v. *P. G. Neill*, 380 U.S. 451 (1965).

In the event that the Court does not consider appeal the proper mode of review appellant requests that the papers upon which this appeal is taken be regarded as a petition for writ of certiorari pursuant to 28 U.S.C. § 2103.

STATUTORY PROVISION INVOLVED

The validity of appellee's application of 5 R.C.M. § 84-905, p. 67 (Supp. 1976) is involved in this appeal which states:

"The department [Montana Department of Revenue] must assess all the properties described in section 84-901 . . ., the value of such properties for assessment purposes to be determined upon such factors as the department shall deem proper."

QUESTIONS PRESENTED

(1) Did appellee's property tax valuation of appellant's Montana property violate the Commerce Clause, U. S. Const. Art. I, § 8, and the Due Process Clause, U. S. Const. Amend. XIV, § 1, by using in the unitary valuation method a cost of plant factor which is derived from appellant's plant outside of Montana which is taxed by other states?

(2) Did appellee's Montana property tax allocation of appellant's system-wide property violate the Commerce Clause, U. S. Const. Art. I, § 8, and the Due Process Clause, U. S. Const. Amend. XIV, § 1, when the allocation ratio was partially based upon the relation of appellant's net income derived in Montana to appellant's system-wide net income and when a substantial amount of appellant's Montana net income is attributable to appellant's plant located outside of Montana and taxed by other states?

STATEMENT OF THE CASE

Appellant is a Maine corporation, which operates as an electric utility in Oregon, Washington, California, Wyoming, Idaho and Montana (R. 3). In 1973,

2.64% of its electric operating revenues were derived from Montana, while only 0.23% of its system-wide investment in electric generating facilities was in Montana (R. 3, App. Memo. p. 2 made part of record, R. 32). Appellant's Montana generating facilities were therefore insufficient to provide appellant's Montana electrical load. For appellant to serve Montana customers, it must devote generating resources located in other states to the needs of Montana customers. The Montana load is served by generating facilities located primarily in the states of Wyoming and Washington (R. 3).

Because these facilities are devoted, in part, to Montana customers a portion of their costs and related expenses must be included in the Montana rate base. In making this allocation for rate purposes, appellant employs a five-state allocation method (R. 4, 5). Generating facilities and system transmission facilities are allocated among five states on the basis of each state's contribution to system demand (R. 4, 5). Because appellant has insufficient generation property in Montana to serve its Montana load, the effect of this allocation for rate making purposes is to allocate to Montana the property outside the state which is servicing Montana (R. 4, 5). This has the effect of making appellant's income from Montana dependent upon property situated outside of Montana (R. 5, 6, 17, 24).

In calculating appellant's Montana property tax assessment for 1974 appellee used three traditional

unitary methods of valuation as different indicators of value: stock and debt, plant cost, and capitalized income (R. 5, 10). In applying the unitary plant cost method appellee used a fictional allocated value even though the actual cost of plant in Montana was known (R. 12-14). The fictional value was the Montana allocation of the total system cost of plant which resulted in Montana assessing a portion of appellant's property located outside of Montana (R. 10, 11). Appellee then used a weighted average of three indicators of system-wide value to develop an average system-wide value. A portion of this value was then allocated to Montana by use of a ratio (R. 10). Appellee used the ratio of 2%, derived by averaging (a) the ratio of the cost of situs Montana plant to the cost of total system plant and (b) the ratio of Montana net income to system net income (R. 5, 18, 21). By including the net income ratio in the allocation ratio appellee effectively imported into Montana physical plant located outside the state for assessment purposes since Montana net income was substantially derived from plant located elsewhere (R. 5).

Appellant appealed this tax assesment to the Montana State Tax Appeal Board ("STAB") contending in its Memorandum to the Board dated August 27, 1974 (R. 32) and in oral testimony that there were two errors inherent in the method employed by appellee which resulted in an unconstitutional tax assessment. The first error results from using a fictitious cost of plant indicator in the system valuation stage of tax assessment when the actual cost of Montana

plant is known and when the development of the fictional value causes the inclusion of plant physically located outside of Montana. The second error is the derivation of the allocation ratio based in part upon net income thereby resulting in Montana's assessment of physical property located and taxed outside of Montana. Appellant's Memorandum, (p. 7) contended:

> "The attribution to Montana of plant located *and taxed* in another state results in double taxation of that plant and, if upheld, would be unconstitutional. *Standard Oil Co.* v. *Peck*, 342 U.S. 382, 96 L. Ed. 427, 72 S. Ct. 309 (1952)."

The constitutional issues were also raised in the Hearing before the STAB, August 27, 1974, in which appellee admitted that it could not tax property outside Montana and appellant explained how the assessment method did, in fact, tax such out of state property:

> "MR. DRUMMOND (attorney for appellant): Mr. McGinnis, is the Department asserting the right to tax property located outside of the State of Montana?
>
> MR. McGINNIS (attorney for appellee): Absolutely not (R. 18).
>
> . . . . .
>
> MR. DRUMMOND: Sure, Montana rate base for purposes of making rates in Montana includes generating facilities and these generating facilities are located, let's say, in Wyoming; so, their rates are based upon plant that is located outside of the State of Montana. If Montana could legally assess property located in Wyoming, then we would really have no quarrel with the method applied by the Department (R. 24).

> . . . . .
>
> MR. DRUMMOND: . . . It's quite clear that if you take a state such as Wyoming, which has large generating plants there that are in excess of what they need to supply Wyoming load, they are more inclined to use a property factor, to be sure, because the property is located there; . . . . Legally, however, Wyoming is entitled to tax the property located within its borders. If all of Pacific's generating plants were located within Wyoming, Wyoming would have the right to tax them all and legally, Montana couldn't tax any of them. . . . If, someday, the states all get together and say that the best way to allocate a system, such as Pacific, is on the basis of income, and if they all agree to it, fine; but, they haven't. . . . Until they do, it is our position that Montana has no right to tax those plants (R. 31)."

The STAB found as part of its Findings of Fact and Conclusions of Law (pp. 3, 4):

> "The Department of Revenue had information available to show the actual historic cost of plant in Montana, but they substituted an allocated value of plant that resulted in a fictitious amount that was in excess of the actual cost of plant.
>
> . . . . .
>
> "Application of a rigid formula for assessment purposes may appear desirable when assessing similar properties, but in many cases produces inequitable results due to the fact that while certain industry properties may be similar in na-

ture, they are not identical in operation.

. . . . .

"The Department of Revenue adopted a fundamentally wrong principle of assessment when, knowing the actual historic cost of the subject plant, they substituted an allocated value of plant that exceeded the actual cost; thereby violating the requirement to determine the actual cash value for taxation of that portion of the plant and property situated within Montana."

The STAB further ordered that the proper allocation ratio which should be used is 1.68% which is the ratio based on cost of plant alone (p. 5).

Appellee petitioned the District Court of the First Judicial District of the State of Montana in and for the County of Lewis and Clark for review of the STAB opinion. Appellant again raised the constitutional issues by contending in its Respondent's Brief (pp. 6, 9), its Reply Brief (pp. 3-6), and in oral argument that the use of a fictitious plant value in the assessment stage in this instance and that the use of a ratio in the allocation stage which was based on net income representing generation plant outside of Montana, resulted in unconstitutional double taxation of appellant's property violating the Commerce Clause and Due Process Clause:

"Appellant's basic error in approach to allocation is the inclusion of net income derived from production facilities outside Montana as an index of value. This method results in taxation of property outside Montana and is prohibited. See, for example, *Norfolk & Western R. Co.* v. *Missouri Tax Comm.*, 390 U.S. 317." Appellant's Reply Brief (p. 3).

The Montana District Court adopted most of the Findings and Conclusions of Law of the STAB as its own and made the following additional findings in its Findings of Fact and Conclusions of Law (pp. 3-6):

"FINDINGS OF FACT AS DISCLOSED BY THE RECORD

. . . . . .

"XI. The method used by [appellee] . . . in effect includes revenue derived from generating plant located outside Montana. Generating plant located in Oregon, Wyoming, California, Idaho, Washington, respectively, is taxed in each of those states.

. . . . . .

"XIII. Net income reported by Pacific Power & Light Company and allocated to Plant Value by the Department of Revenue depends on generation of power provided by plant located outside of the state of Montana.

"XIV. . . . However, as to those utilities which operate within California and also outside California, the state uses the capitalized income method and the stock and debt method used by Montana and allocates those factors. The plant factor, however, is determined by actual situs value.

"XV. All other states in which Pacific Power & Light Company operates use the same method as California.

. . . . . .

"XVII. The method of assessment of Pacific Power & Light Company's property for 1974 tax purposes was a departure from the way the property had been assessed in previous years.

"XVIII. Uniformity of assessment between the states in taxing multistate utilities is desirable and equitable. The system employed by the Department of Revenue destroys the uniformity between Montana and all other states where Pacific Power & Light Company is located.

. . . . .

"CONCLUSIONS OF LAW

. . . . .

"II. Allocation, including net income, is not properly utilized to determine plant value when plant site's historical cost is known.

"III. . . . The application of the formula used by the Department of Revenue produces inequitable results as between utilities which are solely in-state and utilities which are inter-state.

"IV. The Department of Revenue adopted a fundamentally wrong principle of assessment when, knowing the actual historical cost of the subject plant, they substituted an allocated value of plant that exceeded the actual cost and included within said allocated value income generated by plant facilities located outside the state of Montana.

"V. The allocation method for plant value used by the Department of Revenue includes for valuation purposes property located outside the state of Montana.

"VI. The allocation method for plant value includes income as a portion of such allocation; the income is already considered as a capitalized income factor.

. . . . .

"IX. The method of allocation for plant value used by the Department of Revenue is at variance with the express goal of the department to assess only that property of respondent located in Montant."

Appellee appealed the District Court Judgment and Decree to the Supreme Court of the State of Montana. In its Respondent's Brief (pp. 20, 21, 24) and in oral argument before the Supreme Court, appellant again raised the constitutional issues raised herein. In its Opinion (p. 3) the Montana Supreme Court acknowledged "that the Utility objected to the foregoing assessment on the ground that it resulted in imposition by Montana of a property tax on generating facilities located outside the state." However, the Supreme Court failed to address the constitutional issues directly, holding only that the three-factor unitary assessment approach is a fair and appropriate way of determining the value of the Montana portion of an interstate entity. Appellant again raised the constitutional issues in its Petition for Rehearing (pp. 6, 7) before the Montana Supreme Court, specifically noting that the Supreme Court had overlooked the constitutional issues and asking the Montana Supreme Court to reconsider its opinion. The Petition for Rehearing was denied, "for the reason that all grounds set forth in said petition are without merit . . . ." (p. 1).

SUBSTANTIALITY OF FEDERAL QUESTIONS

The Montana District Court found that appellee's application of the Montana assessment statute was fundamentally wrong because the allocated value of plant included income generated by facilities located outside of Montana and because the allocation method included property outside of Montana. The Montana Supreme Court's reversal of the District Court and its rejection of appellant's constitutional arguments therefore upheld the validity of appellee's application of the Montana assessment statute after the issue of its being repugnant to the Constitution was specifically drawn into question. This case is analogous to *American Oil* v. *P. G. Neill, supra,* in which this Court noted probable jurisdiction pursuant to 28 U.S.C. § 1257 after the trial court had found that the imposition of an Idaho excise tax violated the Due Process and Commerce Clauses because it was applied to a sale outside of Idaho and the Idaho Supreme Court thereafter reversed the trial court.

Appellee's assessment valued appellant's Montana property for 1974 at $22,483,962. The method ordered by the STAB and affirmed by the District Court would value the same Montana property at $19,127,-710. This is a discrepancy of 18% which is so gross that it requires reversal because it arises not from an impreciseness of numbers but from a method which ignores the reality of the status of the taxpayer's property in Montana. *Norfolk and Western R. Co.* v. *Missouri Tax Commission,* 390 U.S. 317 (1968). The

unconstitutional discrepancy is compounded because each year appellee has and presumably will repeat its unconstitutional tax assessment. Already this has imposed upon appellant a liability for Montana property taxes for three years in the amount of $315,590 for property which in fact lies in other states.

The constitutional issues in this case are substantial even without regard to the specific monetary effects of the unconstitutional infringement upon appellant. While this Court has often reviewed one-factor assessment and allocation methods, in this case appellee has used a more complex formula which obscures the reality of its taxation of property outside the state. If this Montana Supreme Court opinion is not reversed, other taxing authorities will be encouraged to derive their own complex assessment and allocation ratios which will best serve their interests in collecting a maximum amount of tax from an interstate taxpayer. This would have the effect, as was recognized by the Montana District Court, of destroying the uniformity of assessment between states in taxing multi-state entities and would be at variance with appellee's express goal of constitutionality assessing only that property located within the state.

In *Norfolk and Western R. Co.* v. *Missouri Tax Commission, supra,* at 325 this Court stated:

> "A State will not be permitted under the shelter of an imprecise allocation formula or by ignoring the peculiarities of a given enterprise, to 'project the taxing power of the state plainly beyond its borders' (citing case). Any formula used must

> bear a rational relationship, both on its face and in its application, to property values connected with the taxing State."

The Montana District Court specifically found that the assessment applied by appellee to appellant's property includes property located outside the State of Montana. The Montana Supreme Court did not dispute this fact established by the record. Instead it totally ignored the constitutional prohibitions against such property taxation outside of the State of Monana by erroneously granting a special sanctity to the unitary method. The Court's focus on the unitary method was misdirected because the issue of the allocation ratio arises in the allocation step which comes *after* the unitary method of valuation is applied. More importantly, even if the unitary method were directly involved, the unitary method cannot be used to shield unconstitutional taxation of property outside the state. Justice Holmes explained in *Fargo* v. *Hart*, 193 U.S. 490, 500-501 (1904):

> "It is obvious, however, that this notion of organic unity may be made a means of unlawfully taxing the privilege, or property outside the state, . . . if it is not closely confined to its true meaning. So long as it fairly may be assumed that the different parts of a line are about equal in value, a division by mileage is justifiable. But it is recognized in the cases that if, for instance, a railroad company had terminals in one state equal in value to all the rest of the line through another, the latter state could not make use of the unity of the road to equalize the value of every mile.

> That would be taxing property outside of the state under a pretense."

In this case appellee has assumed incorrectly that appellant's proportion of income in the states in which it operates is approximately equal to the proportion of property in such states. By using the net income ratio it is taxing apellant's property outside of the state under a pretense which directly violates the Commerce Clause and the Due Process Clause. Reversal of the Montana Supreme Court opinion is therefore required.

CONCLUSION

For the reasons outlined above probable jurisdiction of this appeal should be noted.

Respectfully submitted,

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APPENDIX

Findings of Fact, Conclusions, and Order of the State Tax Appeal Board of the State of Montana

BEFORE THE STATE TAX APPEAL BOARD
OF THE STATE OF MONTANA

PACIFIC POWER & LIGHT CO., *Appellant*,	Doc. No. PT-1974-6
vs.	
THE DEPARTMENT OF REVENUE OF THE STATE OF MONTANA, Respondent.	FINDINGS OF FACT, CONCLUSIONS, AND ORDER

Hearing on the appeal of PACIFIC POWER & LIGHT COMPANY, pursuant to Sections 84-708 and 84-903.1, R.C.M. 1947, from the decision of the Montana Department of Revenue regarding Appellant's property tax assessment, came on regularly for hearing on August 27, 1974, at 10:00 a.m., in the City of Helena, Montana, before the Board; the Appellant, Pacific Power & Light Company, appearing through its attorneys, C. Eugene Phillips, Gerard K. Drummond, and Mark H. Peterman, and William K. Turnock, its Property Tax Administrator; and the Department of Revenue appearing through its attorney, R. Bruce McGinnis, and Dennis M. Burr, Administrator of the Property Assessment Division, and Kenneth K. Morrison, Inter-County Bureau Chief; and the Board having heard the testimony and having examined all of the evidence offered by all parties, and the Board

being fully advised in the premises, does hereby make its Findings of Fact, Conclusions, and Order as follows:

FINDINGS OF FACT

I.

The property which is the subject of this appeal is the property of Pacific Power and Light Company, situated within Montana in the counties of Flathead, Lake, Big Horn, Yellowstone, Carter, Lincoln and Rosebud.

II.

The assessment made of the subject property for property tax purposes was made by the Inter-County Bureau of the Property Assessment Division of the Montana Department of Revenue.

III.

The total equalized assessed value of the subject property located in Montana as determined by the Montana Department of Revenue is $9,892,943.00.

IV.

The Department of Revenue representative testified that a unitary method of assessment was used to determine the value of subject property.

V.

In using such unitary method, the Department of Revenue also applied a particular formula to determine the final value in question.

VI.

The Department of Revenue representatives testified that the same method and formula had been used in assessing other similar utility company properties.

VII.

The Department of Revenue considered three factors, or indicators of value, in their assessment deliberations of the subject property.

VIII.

Those three factors, or indicators of value, are identified as:

1. Stock and Debt value
2. Cost of Plant value
3. Capitalized Income value

IX.

The Department of Revenue assessors then applied a percentage weighting to each of the three factors as follows:

10% to Stock and Debt
50% to Cost of Plant
40% to Capitalized Income

X.

The Department of Revenue assessors finally applied an equalization factor of 44 percent to determine the Montana assessed value.

XI.

The Department of Revenue used a reasonable approach to allocate system stock and debt value to Montana.

XII.

The Department of Revenue had information available to show the actual historic cost of plant in Montana, but they substituted an allocated value of plant that resulted in a fictitious amount that was in excess of the actual cost of plant.

XIII.

The Department of Revenue failed to capture all of the value of the subject utility property in their computations when their computations show the value of electric plant only and do not include the costs represented by water plant, construction work in progress, plant held for future use, and materials and supplies.

XIV.

The Department of Revenue plant cost values and the corrected values are as follows:

The Department of Revenue computations:

System	*Montana*	*Ratio*
$1,335,568,826	$21,310,719	1.60%

Whereas, the correct total of all properties should be:

System	*Montana*	*Ratio*
$1,372,463,365	$23,118,600	1.68%

Difference:

System	*Montana*	*Ratio*
$ 36,894,539	$ 1,807,881	.08%

XV.

The Department of Revenue correctly computed the Montana ratio of reported net operating income to be 2.37 percent of the total system income.

XVI.

The Department of Revenue applied a reasonable weighting to each of the three factors.

CONCLUSIONS

I.

The unitary approach to value is a proper method to be utilized but in some instances must be modified to produce equitable results.

II.

Application of a rigid formula for assessment purposes may appear desirable when assessing similar properties, but in many cases produces inequitable results due to the fact that while certain industry properties may be similar in nature, they are not identical in operation.

III.

The Department of Revenue adopted a fundamentally wrong principle of assessment when, knowing the actual historic cost of the subject plant, they sub-

stituted an allocated value of plant that exceeded the actual cost; thereby violating the requirement to determine the actual cash value for taxation of that portion of the plant and property situated within Montana.

ORDER

The Department of Revenue's assessment of the subject property appealed from is, therefore, reversed and set aside, and,

IT IS HEREBY ORDERED THAT the proper officers proceed with a re-assessment of the subject property in the same manner as they did in the first assessment, but with the following exceptions:

The cost of plant shall be the corrected figures and ratio referred to in Findings of Fact Number XIV. Those figures and ratio being:

System Cost of Plant	*Montana Cost of Plant*	*Montana Ratio*
$1,372,463,365.00	$23,118,600.00	1.68%

No other plant value or ratio may be substituted.

DATED this 10th day of September, 1974.

BY ORDER OF THE
STATE TAX APPEAL BOARD
Ray J. Wayrynen
RAY J. WAYRYNEN, Chairman
J. Morley Cooper
J. MORLEY COOPER, Member

Member HELEN M. PETERSON dissenting:

FINDINGS OF FACT

Findings of Fact numbered I through XI are concurred in.

The following differing and additional Findings of Fact are submitted:

I.

The Department of Revenue was furnished figures to show actual historic cost of Pacific Power and Light Company's plant in Montana, but, as they had with other utilities, determined value of plant by the allocation method.

II.

The Department of Revenue failed to capture all of the value of the subject utility property. The Department's computations do not include certain costs represented by water plant, construction work in progress, material and supplies and plant held for future use. The proper ratio of Montana plant to system plant would therefore be 1.68 percent instead of 1.6 percent.

III.

Market value is based on the concept of what a willing and informed buyer would pay a willing and informed seller. It is inconceivable that income would not be considered in such a hypothetical transaction. Therefore, when income is not considered in calculating the ratio of the subject utility company's property in Montana in relation to the value of the system in

the other states in which the company operates, the effect is to export value out of Montana.

IV.

By the statement of its own attorney, Mr. Gerard K. Drummond, the subject utility imports plant values into Montana for rate making purposes. On page 4 of the transcript of hearing, Mr. Drummond says, ". . . System resources, such as generation and transmission, are treated for purposes of determining the company's income from any particular state and for rate making purposes as allocable to each of the five states in the five-state system . . ."

CONCLUSIONS

I.

If plant value only is used in determining the ratio of value of property of any multi-state corporation which operates in Montana in comparison to its value in other states, and if such factors as income and stock and debt are ignored, then the property would not be assessed by the unitary method, which method has been upheld by the Supreme Court of Montana.

II.

If the unitary method is not used, the effect is to export value from Montana.

III.

Ratio for the subject property in Montana should

be determined by averaging income at 2.37 percent and plant at 1.68 percent for a Montana ratio of 2.025 percent.

IV.

The approach of the Department of Revenue in applying the same formula to all centrally assessed properties used in the same industry is correct. Any other approach would open the Department of Revenue to charges of discrimination.

Helen M. Peterson
HELEN M. PETERSON, Member

ATTEST:

Vernon B. Miller
VERNON B. MILLER, Admin. Sec.

Findings of Fact and Conclusions of Law of the District Court of the First Judicial District of the State of Montana, in and for the County of Lewis and Clark

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE OF MONTANA, IN AND FOR THE COUNTY OF LEWIS AND CLARK

THE DEPARTMENT OF REVENUE OF THE STATE OF MONTANA,

Appellant,

vs.

PACIFIC POWER & LIGHT COMPANY,

Respondent.

No. 38329

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The appeal of The Department of Revenue of the State of Montana, pursuant to Section 84-709.1, R.C.M. 1947, from the decision of the Montana State Tax Appeal Board regarding the property tax assessment of Pacific Power & Light Company, came on regularly for hearing on July 10, 1975 before the Honorable Peter G. Meloy, District Judge of the First Judicial District of the State of Montana, County of Lewis and Clark. The appellant, The Montana Department of Revenue of the State of Montana, appearing through its attorneys, R. Bruce McGinnis and Robert A. Poore; and the respondent, Pacific Power

& Light Company, appearing through its attorneys, Mark H. Peterman and Douglas D. Dasinger, and the Court having examined all of the evidence of the whole record and the parties having submitted briefs, and the Court being fully advised in the premises, does hereby find and conclude as follows:

Findings of Fact as disclosed by the record.

I.

The property which is the subject of this appeal is the property of respondent, Pacific Power & Light Company, situated within the State of Montana in the counties of Big Horn, Carbon, Flathead, Lake, Lincoln, and Yellowstone.

II.

The assessment made of the subject property for property tax purposes was made by the Inter-County Bureau of the Property Assessment Division of the Montana Department of Revenue;

III.

The total equalized assessed value of the subject property located in Montana as determined by the Montana Department of Revenue is $9,892,943.00;

IV.

A unitary method of assessment was used to determine the value of the subject property, and the Department of Revenue considered three factors or indi-

cations of value in its determination of value. These three factors or indications of value are:

1. Stock and Debt Value
2. Capitalized Income Value
3. Plant Value

The total value of the property was first determined, and then the unit value of each factor or indicator was allocated to property in Montana.

V.

The Department of Revenue assessor then applied a percentage weighting to each factor as follows:

Stock and Debt Value	10%
Capitalized Income Value	40%
Plant Value	50%

An equalized factor of 44% was then used to determine the Montana assessed value;

VI.

In determining the Plant Value factor to be allocated to Montana, the Department of Revenue first divided the historic cost of Montana Plant by the historic cost of total System Plant, which gave a ratio of 1.60%. The Department then divided Montana Net Income by Total System Net Income, which gave a ratio of 2.37%. The two ratios were then averaged which gave a 2.0% ratio for the Plant Value factor;

VII.

The Department of Revenue failed to capture all

of the historic cost of the subject utility property in their computations, as said computations do not include the costs represented by water properties, construction work in progress, materials and supplies, and plant held for future use. The ratio of historic cost of Montana Plant to System Plant should have been 1.68%, rather than 1.60%.

VIII.

The Department of Revenue values and the corrected values are as follows:

1. Department of Revenue computations:

System	*Montana*	*Ratio*
$1,335,568,826.00	$21,310,719.00	1.60%

2. Corrected values:

System	*Montana*	*Ratio*
$1,372,463,365.00	$23,118,600.00	1.68%

IX.

The 2.0% ratio of Plant Value allocated by the Department of Revenue was a fictitious ratio in excess of the actual cost of Plant located in Montana;

X.

The allocation of system stock and debt value and of system capitalized income value to Montana was reasonable and proper. The weighting of the three factors was reasonable and proper.

XI.

The method used by the Department of Revenue to arrive at the 2% ratio for Plant Value, in effect, includes revenue derived from generating plant located outside Montana. Generating plant located in Oregon, Wyoming, California, Idaho and Washington, respectively, is taxed in each of those states.

XII.

Income as a factor or indicator of value is already considered in Capitalized Income.

XIII.

Net income reported by Pacific Power & Light Company and allocated to Plant Value by the Department of Revenue depends on generation of power provided by plant located outside the State of Montana.

XIV.

Only two utility companies in the State of California operate outside that state as well as within that state. California uses the unitary method of assessment. However, as to those utilities which operate within California and also outside California, the state uses the capitalized income method and the stock and debt method used by Montana, and allocates those factors. The plant factor, however, is determined by actual situs value.

XV.

All other states in which Pacific Power & Light

Company operates use the same method as California. The other states in which Pacific Power & Light Company operates are California, Wyoming, Oregon, Washington and Idaho.

XVI.

The Department of Revenue does not assert any right to tax property located outside the State of Montana. The primary goal of the Department of Revenue is to assess the property of Pacific Power & Light Company located in Montana;

XVII.

The method of assessment of Pacific Power & Light Company's property for 1974 tax purposes was a departure from the way the property had been assessed in previous years;

XVIII.

Uniformity of assessment between states in taxing multi-state utilities is desirable and equitable. The system employed by the Department of Revenue destroys the uniformity between Montana and all other states where Pacific Power & Light Company is located;

XIX.

All utilities in Montana are not similarly situated. Montana Power Company has all its generating and transmission facilities within the state.

CONCLUSIONS OF LAW

I.

The unitary approach to value is a proper method of assessment.

II.

Allocation, including net income, is not properly utilized to determine plant value when plant situs historical cost is known.

III.

Although certain industries may be similar in nature, they are not identical in scope or operation. The application of the formula used by the Department of Revenue produces inequitable results as between utilities which are solely in-state and utilities which are inter-state.

IV.

The Department of Revenue adopted a fundamentally wrong principle of assessment when, knowing the actual historic cost of the subject plant, they substituted an allocated value of plant that exceeded the actual cost and included within said allocated value income generated by plant facilities located outside the State of Montana.

V.

The allocation method for plant value used by the Department of Revenue includes for valuation purposes property located outside the State of Montana.

VI.

The allocation method for plant value includes income as a portion of such allocation; the income is already considered in the Capitalized Income factor.

VII.

The method of allocation for plant value is at variance with the other five states served by respondent and destroys uniformity of assessment.

VIII.

The percentage weighting to each factor and the equalization factors used by the Montana Department of Revenue was proper and reasonable.

IX.

The method of allocation for plant value used by the Department of Revenue is at variance with the expressed goal of the Department to assess only that property of respondent located in Montana.

X.

The adoption of a fictional ratio of 2% for plant value is erroneous when the true historical cost of plant in Montana is known. The correct ratio for plant value is 1.68%.

The decision of the State Tax Appeal Board is affirmed.

Let Judgment enter accordingly.

Dated this 18 day of December, 1975.

PETER G. MELOY

District Judge

Opinion of the Supreme Court of the State of Montana

No. 13273

THE DEPARTMENT OF REVENUE OF THE STATE OF MONTANA,

Appellant,

vs.

PACIFIC POWER & LIGHT COMPANY,

Respondent.

Appeal from: District Court of the First Judicial District, Honorable Peter G. Meloy, Judge presiding.

Submitted: October 21, 1976

Decided: Dec. 29, 1976

Filed: Dec. 29, 1976

Thomas J. Kearney,
Clerk

Mr. Justice Frank I. Haswell delivered the Opinion of the Court.

This appeal involves the validity of the Montana Department of Revenue's method of assessment of taxes on the Montana property of an interstate electric utility. The state tax appeal board and the district court held the method of assessment invalid, reduced the assessment, and a 1974 tax reduction of approximately $100,000 resulted. We reverse.

By way of overview, the general method of assess-

ment by the Department of Revenue (DOR) was the unitary method of assessment. DOR used a formula calculated to value the utility's operating property in Montana on the basis of its value as a part of the utilitys' total interstate electric generating and transmission system. The validity of the method of assessment by use of this formula is the underlying issue on appeal.

Pursuant to statute, Pacific Power & Light Company (Utility) submitted its annual statement of earnings, stock, and debt information to DOR for use in assessing its Montana properties. DOR assessed the Utility based on information contained in the statement using the "unitary" method of assessment employed in valuing the property of interstate corporations and systems. A three-factor formula of stock and debt, cost of plant, and capitalization of income was employed. Each of the factors was used to ascertain a TOTAL system value. These were as follows:

INDICATOR OF VALUE	TOTAL UTILITY SYSTEM VALUE
Stock and debt	$1,076,198,551
Plant at Cost	$1,347,395,000
Income (Capitalized at 8.25% over 2 years)	$ 857,201,842

Each of these indicators was weighted by a percentage reflecting DOR's evaluation of its relative importance in the overall structure of the Utility's electric system. Stock and debt was assigned a weight of 10%;

plant at 50%; and income at 40%. These values, when totaled, resulted in a composite estimated total value for the Utility's entire interstate electric generating and transmission system of $1,124,198,092.

The next step in the assessment procedure involved allocation of a proper portion of this system value to the physical plant located in Montana. DOR calculated the ratio of the cost of the Montana plant to the total plant and obtained a percentage of 1.60%. The value of the two water plants of the Utility in Montana were excluded on the basis they were not a continuous part of the operation of the interstate electric system and accordingly were taxed at the county level. DOR also computed the ratio of Montana plant to total plant on a revenue producing basis and determined Montant produced 2.37% of total system revenue. These two ratios were averaged and resulted in a final ratio of 2% representing the portion of total system value of Montana operating properties. The weighted estimate of total system value was multiplied by this 2% figure to obtain the *value* of Montana property of $22,483,962. This value was equalized at 44%, the percentage figure used in equalization of computations of electrical utility property, for a total assessed value of $9,892,943.

The Utility objected to the foregoing assessment on the ground that it resulted in imposition by Montana of a property tax on generating facilities located outside the state. It argued this made its system unique and by reason thereof, DOR's method of assessment

was illegal and inequitable. The Utility contended the historic cost of Montana's portion of the system must be utilized in computing the cost of plant indicator. The Utility's assertion was that a figure of $23,118,-600 was a proper figure for cost of plant to be "weighted" by 50% to give a total Montana plant value of $11,559,300. Totaling of the alternate plant cost with the other two figures (stock and debt; capitalized income) computed in the same manner as DOR, yields a total valuation of $19,127,710. This figure, "when equalized" at 44% gives a total assessed value of $8,416,192, asserted by the Utility to be the correct figure.

The Utility also objected to DOR's computation of the allocation factor used to determine the percentage of total system value in Montana. It claimed the only proper elements for comparison were in-state system cost compared to total system cost. The Utility claimed any attempt to compare revenue produced in Montana to total sysem revenue would result in taxation of out-of-state properties because all its generating facilities were located outside Montana.

A hearing before DOR was held at the Utility's request and resulted in a refusal to alter DOR's assessment. The Utility appealed DOR's decision to the state tax appeal board (STAB) and a majority of STAB determined the Utility's methodology and final assessment computations to be correct. The pertinent findings of fact of the majority were:

"The Department of Revenue used a reasonable approach to allocate system stock and debt value to Montana.

"The Department of Revenue had information available to show the actual historical cost of plant in Montana, but they substituted an allocated value of plant that resulted in a fictitious amount that was in excess of the actual cost of plant.

". . . . .

"The Department of Revenue plant cost values and the corrected values are as follows:

"The Department of Revenue computations:

"System	*Montana*	*Ratio*
$1,335,568,826	$21,310,719	1.60.%

"Whereas, the correct total of all properties should be:

"System	*Montana*	*Ratio*
$1,372,463,365	$23,118,600	1.68%

"Difference:

"System	*Montana*	*Ratio*
$36,894,539	$1,807,881	.08%"

The STAB majority concluded:

"The unitary approach to value is a proper method to be utilized but in some instances must be modified to produce equitable results.

". . .

"The Department of Revenue adopted a fundamentally wrong principle of assessment when,

knowing the actual historic cost of the subject plant, they substituted an allocated value of plant that exceeded the actual cost; thereby violating the requiremenet to determine the actual cash value for taxation of that portion of the plant and property situated in Montana."

Based on these conclusions, STAB ordered DOR to utilize the 1.68% ratio and the "correct totals" set forth above.

STAB member Peterson dissented and submitted findings and conclusions in dissent, asserting the methodology employed by DOR to be correct. The pertinent part of the dissent was expressed in this language:

"Market value is based on the concept of what a willing and informed buyer would pay a willing and informed seller. It is inconceivable that income would not be considered in such a hypothetical transaction. Therefore, when income is not considered in calculating the ratio of the subject utility company's property in Montana in relation to the value of the system in other states which the company operates, the effect is to export value out of Montana."

DOR appealed the STAB decision to the district court, Lewis and Clark County, which upheld the STAB decision. DOR appealed to this Court.

At issue here is a determination of the proper method of valuation of the Utility's Montana operating properties. Montana has utilized the 3-factor, unitary assessment approach for appraisal of interstate

utility property for many years. The method has been approved by this Court in the past as a fair and appropriate way of determining the *value* of the Montana portion of an interstate entity for property taxation. Yellowstone Pipe Line Co. v. State Board of Equalization, 138 Mont. 603, 358 P.2d 55; Western Airlines, Inc. v. Michunovich, 149 Mont. 347, 350, 351, 428 P.2d 3.

In discussing the "unitary" or "going concern" approach in *Western Airlines, Inc.*, we stated:

> ". . . The 'unitary' method represents an attempt to realize a fair assessment value on property which is not habitually located in any given state, but which is used extensively in interstate commerce. The underlying philosophy of the 'unitary' method is that property so used forms a part of an organic system and may be assessed in terms of the economic contribution which each compenent (sic) makes to the entire system. This approach has been firmly established in a series of decisions of the Supreme Court of the United States. . . .
>
> "A good statement of the purpose and operation of the 'unitary' method is found in Pullman Co. v. Richardson, 261 U.S. 330, 338, 43 S. Ct. 366, 368, 67 L ed 682.
>
> > " 'And, if the property be part of a system and have an augmented value by reason of a connected operation of the whole, it may be taxed according to its value as part of the system, although the other parts be outside the state; in other words, *the tax may be made to cover the enhanced value which*

> > *comes to the property in the state through its organic relation to the system.*' " (Emphasis added.)

The Utility urges this Court to hold the actual cost of the physical plant as an appropriate measure of "value" for assessment purposes and asserts the method utilized by DOR results in an artificial and contrived "value." Section 84-401, R.C.M. 1947, requires assessment of property at its "full cash value." Value does not equal cost. Western Union Telegraph Co. v. Taggart, 163 U.S. 1, 16 S. Ct. 1054, 41 L ed 49; Cleveland & Railway Co. v. Backus, 154 U.S. 439, 445, 14 S. Ct. 1122, 38 L ed 1041. In *Cleveland* a decision involving state taxation of interstate railway property, the United States Supreme Court said:

> ". . . the value of property results from the use to which it is put and varies with the profitableness of that use, present and prospective, actual and anticipated. There is no pecuniary value outside of that which results from such use. The amount and profitable character for such use determines the value, and if the property is taxed at its actual cash value it is taxed upon something which is created by the uses to which it is put. . . ."

The electric system property of the Utility in Montana, although only 1.6% of the total utility system, provides 2.37% of the total annual revenue of the Utility. Any measure of the *value* of this property must include consideration of the use to which the property is put and the income contributed to the

system. DOR, in an effort to assess this value, averaged the 1.6% figure, representing the Montana share of the physical plant within the total electrical system, with the 2.37% figure representing the income provided by Montana through effective, efficient use of the plant. This averaging yielded the 2% used as an appropriate percentage of total value of the Utility's property within Montana. This reflects a consideration of the worth or value of the Montana property as a part of an on-going, profitable enterprise, the value of the parts of which is greater when combined into an integrated utility system. To accept the Utility's contention that actual cost is controlling (as did STAB and the district court) is to ignore totally the "value" flowing from the operation of the system. Again, in *Western Airlines, Inc.* the Court stated:

> "Thus the 'unitary' method determines not only the appropriate share of the entire enterprise which may be taxed by each state but also determines the 'enhanced value' attributable to the equipment used by virtue of its being a component part of the system. The 'unitary' method assumes that the value of the entire system, as a going concern, is somewhat greater than the total fair market value of its equipment."

See also: Yellowstone Pipe Line Co. v. State Board of Equal., supra.

We further hold that DOR correctly excluded the waterplant facilities that are taxed locally by the counties where they are located. These water plants are not properly a part of the operating interstate

electrical system and as such do not affect the valuations of interstate properties dealt with in this opinion. The exclusion of these properties requires affirmation of the 1.60% figure used by DOR, rather than the 1.68% offered as an alternative by the Utility, in applying the unitary assessment method.

The judgment of the district court is reversed. The assessment of DOR is reinstated in conformity with this opinion.

Frank I. Haswell
Justice

We Concur:

James T. Harrison
Chief Justice
John Conway Harrison
Gene B. Daly
Justices.

Hon. L. C. Gulbrandson, District Judge, sitting for Justice Wesley Castles.

Order Denying Rehearing of Supreme Court of the State of Montana

IN THE SUPREME COURT OF THE STATE OF MONTANA

No. 13273

THE DEPARTMENT OF REVENUE OF THE STATE OF MONTANA,

Appellant,

vs.

PACIFIC POWER & LIGHT COMPANY,

Respondent.

ORDER

PER CURIAM:

The petition for rehearing is denied for the reason that all grounds set forth in said petition are without merit and the original decision and the reasons set forth in the opinion therein are correct.

DATED this 27th day of January.

Gene B. Daly
John Conway Harrison
Frank I. Haswell

Notice of Appeal Filed on March 21, 1977 in the District Court of the First Judicial District of the State of Montana in and for the County of Lewis and Clark

No. 13,273

IN THE SUPREME COURT OF THE STATE OF MONTANA

PACIFIC POWER & LIGHT COMPANY,

Appellant,

vs.

THE DEPARTMENT OF REVENUE OF THE STATE OF MONTANA,

Appellee.

NOTICE OF APPEAL

Notice is hereby given that Pacific Power & Light Company, the Appellant above named, hereby appeals to the Supreme Court of the United States from the final Judgment of the Montana Supreme Court reversing the Judgment of the District Court of the First Judicial District of the State of Montana, in and

for the County of Lewis and Clark, entered in this action on January 27, 1977.

This appeal is taken pursuant to 28 U.S.C.A., Section 1257.

DATED this 18th day of March, 1977.

RIVES, BONYHADI, DRUMMOND & SMITH

And

MURPHY, ROBINSON, HECKATHORN & PHILLIPS

By: *Douglas D. Dasinger*
Douglas D. Dasinger, of Murphy, Robinson, Heckathorn & Phillips
One Main Building, P. O. Box 759
One of the attorneys for Pacific Power & Light Company, Appellant herein

I hereby certify that I served the foregoing _____ on _____ attorney for _____ on the _____ day of _____, 19____, by mailing to him three true and correct copies thereof, certified by me as such. I further certify that said copies were placed in a sealed envelope addressed to the said attorney at _____ which is his regular office address, or his address as last given by him on a document which he has filed in the within entitled cause and served on me; said sealed envelope was then deposited in the United States post office at _____, Oregon, on the day last above mentioned, with the postage thereon fully paid.

_____
Attorney for

Service of the within _____ is hereby accepted in _____, Oregon, this _____ day of _____, 19____, by receiving three copies thereof.

_____
Attorney for _____

76-1368

In the Supreme Court

of the United States

OCTOBER TERM, 1976

No.....

PACIFIC POWER & LIGHT COMPANY,
Appellant,

v.

THE DEPARTMENT OF REVENUE OF THE STATE OF MONTANA,
Appellee.

Appeal from the Supreme Court of the State of Montana

MOTION TO DISMISS APPEAL

Robert A. Poore
Suite 400, Silver Bow Block
Butte, Montana 59701

Of Counsel:

ROBERT CORCORAN, AND
R. BRUCE MCGINNIS
MONTANA DEPARTMENT OF REVENUE
MITCHELL BUILDING
HELENA, MONTANA 59601

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In the Supreme Court

of the United States

OCTOBER TERM, 1976

No.....

PACIFIC POWER & LIGHT COMPANY,
Appellant,

v.

THE DEPARTMENT OF REVENUE OF THE STATE OF MONTANA,
Appellee.

Appeal from the Supreme Court of the State of Montana

MOTION TO DISMISS APPEAL

Appellee moves the Court to dismiss the appeal herein on the following grounds:

I

THE APPEAL IS NOT WITHIN THE JURISDICTION OF THE COURT SINCE THE CONSTITUTIONALITY OF THE MONTANA STATUTE (SEC. 84-905, R.C.M. (1947) WAS IN NOWISE DRAWN IN QUESTION BY THE MONTANA SUPREME COURT OR BY ANY INFERIOR COURT OR TRIBUNAL.

The Montana Supreme Court did not even cite or give any consideration whatsoever to Section 84-905, R.C.M. (1947) specified by Appellant as being in violation of the United States Constitution and hence as being the predicate for this Court's jurisdiction under 28 U.S.C. Sec. 1257 (2).

Nor did Pacific Power even cite or present any argument whatsoever on the constitutionality of Section 84-905 in its Respondent's brief to the Montana Supreme Court. That was also true of the Department of Revenue in its Appellant's and Reply briefs at the Montana Supreme Court level.

Section 84-905 (quoted Jur. St. p. 2) simply provides that the Montana Department of Revenue must assess interstate utility properties and ascertain the value of such properties upon such factors as the Department shall deem proper.

For many years under 84-905 and related taxing statutes pertinent to interstate utilities, Montana has employed the unitary or system method of assessment whereunder estimates of total system values are first made by use of three separate indicators of value after which a portion of such total values is then allocated to Montana based upon the proportional economic contribution which the Montana properties are making to the total system values. (See detailed operation of the method, post, pp. 8 to 15). Such method for determining and apportioning local state values of interstate utilities is in common or general use throughout the United States. The constitutionality of the method and par-

ticularly of its capacity to capture "the enhanced value which comes to the property in the state through its organic relation to the system" has long been the law of this country:

> "Established principles are not lacking in this much discussed area of the law. It is of course settled that a State may impose a property tax upon its fair share of an interstate transportation enterprise. (*citations*) That fair share may be regarded as the value, appropriately ascertained, of tangible assets permanently or habitually employed in the taxing state, including a portion of the intangible, or 'going concern' value of the enterprise. (*citations*) The value may be ascertained by reference to the total system of which the intrastate assets are a part. As the (U.S. Supreme) Court has stated the rule, 'the tax may be made to cover the enhanced value which comes to the (tangible) property in the State through its organic relation to the (interstate) system'. *Pullman Co. -vs- Richardson*, 261 US 330, 338 ."
>
> *Norfolk & Western R. Co. -vs- Missouri Tax Com.* 390 US 317, 323, 324, 19 L ed (2d) 1201, 1206, 88 S. Ct. 995 (1968)

and of the State of Montana:

> *Yellowstone Pipe Line Co. -vs- St. Bd. Equal.*, 138 Mont. 603, 358 P. (2d) 55 (1960)

Western Airlines Inc. -vs- Michunovich, 149 Mont. 347, 428 P. (2d) 3 (1967)
State -vs- State Bd. of Equal. 56 Mont. 413, 185 Pac. 708 (1919)

And so "such factors as the Department (of Revenue) shall deem proper" (of Sec. 84-905, R.C.M. (1947) has historically been and in this case simply was an application of the unitary or system method of assessment.

The mechanics of the Department's implementation of the Unitary Method and of Pacific Power's objections before the Montana Supreme Court are dealt with in detail hereinafter, pp. 8 to 15; however it is undisputable that at no level in the Montana proceedings was the constitutionality of Section 84-905, R.C.M. (1947) "drawn in question" as required to avail this U.S. Supreme Court jurisdiction under 28 USC 1257 (2).

Michigan Cent. R. Co. -vs- Michigan Southern R. Co., 60 U.S. 378, 19 How. 378, 15 L. Ed. 689 (1857)
Green -vs-Frazier, 253 U.S. 233, 40 S. Ct. 499, 64 L. Ed. 878 (1920)
Scudder -vs- New York, 175 U.S. 32, 20 S. Ct. 26, 44 L. Ed. 62 (1899)

And the fertile mind of the advocate to warp each Court contest into some oblique form of due process challenge to some state statute in order to gain direct appeal access to this U.S. Supreme Court will not be tolerated:

"If jurisdiction upon writ of error can be obtained by the mere claim in words that a state statute is invalid, if so construed as to 'apply' to a given state of facts, the right to review will depend in large classes of cases, not upon the nature of the constitutional question involved, but upon the skill of counsel."

Dahnke-Walker Milling Co. -vs- Bondurant, 257 U.S. 282, 298, 42 S. Ct. 106, 111 (1921)

There was no challenge in any manner or degree to the constitutionality of Section 84-905, and where the issue truly is whether a state is or is not taxing property beyond its jurisdiction, the constitutionality of the process can only be reviewed by the U.S. Supreme Court as a matter of discretion by certiorari and not as of right under 28 U.S.C. 1257 (2).

Anderson -vs- Durr, 257 U.S. 99, 42 S. Ct. 15, 66 L. Ed. 149 (1921)
Dana -vs-Dans, 250 U.S. 220, 39 Sup. Ct. 449, 63 L. Ed. 947 (1919)

Appellee's Motion to Dismiss for lack of jurisdiction is sound and should be granted.

II. a) NO SUBSTANTIAL FEDERAL QUESTION IS PRESENTED.

b) THE MONTANA SUPREME COURT JUDGMENT RESTS ON AN ADEQUATE NON-FEDERAL BASIS.

c) U.S. SUPREME COURT RULE 15 (1) (d) NOT COMPLIED WITH AS SHOWING WHEN, WHERE AND THE MANNER IN WHICH ANY CONSTITUTIONAL QUESTION AS TO THE VALIDITY OF SECTION 84-905, R.C.M. (1947) WAS RAISED.

d) IF APPEAL IS TREATED AS PETITION FOR WRIT OF CERTIORARI, STILL NO UNDECIDED FEDERAL QUESTION HAS BEEN RAISED.

The federal question specified by Appellant to allegedly confer Supreme Court jurisdiction is either the constitutionality of 84-905, R.C.M. (1947) itself or the manner in which it was applied (Jur. St. 2). The former is unavailable, as noted in Section I of this brief, because at no level of the Montana proceedings was Section 84-905 cited or construed.

The latter is also unavailable because an appeal to the Supreme Court does not lie to attack the methodology of a tax statute which itself has not been attacked:

> "In order to support an appeal to this Court it is necessary that the question of the validity of the state taxing statute be either presented to the state court or decided by it. It is not sufficient merely to attack as here, the tax levied under the statute or 'the right to collect the tax' which has been levied or to show that the validity of the tax alone has been considered. (*citation*) For 'the mere objection to an exercise of authority under a statute, whose validity is not attacked, cannot be made the basis' of an appeal. (*citations*) It is for this reason that we have held that an appeal will not be sustained where there has been only an attack upon a tax assessment. (*citations*)."
>
> *Wilson -vs- Cook*, 327 U.S. 474, 482, 90 L. Ed. 793 (1946)

Furthermore, discussion of unitary rule methodology pertinent to 84-905 and related Montana statutes aimed at capturing "enhanced values" for intrastate properties through their organic relation to interstate utility systems involves a "much discussed area of the law" and "established principles" (*Norfolk* and *Western* case, supra, page 3); and Appellant's apparent contentions to the contrary that a federal question still exists are without substance and are frivolous and are inadequate to support Supreme Court jurisdiction;

Tidal Oil Co. -vs- Flanagan, 263 U.S. 444, 44 S. Ct. 197, 68 L. Ed 382 (1924)

Boston -vs- Jackson, 260 U.S. 309, 43 S. Ct. 129, 67 L. Ed 274 (1922)

And whether Supreme Court jurisdiction is sought by direct appeal under 28 U.S.C. Sec. 1257 or through certiorari under 28 U.S.C. 2103, a substantial federal question must exist and be specified.

U.S. Supreme Court Rule 15 (1) (d)
U.S. Supreme Court Rule 23 (1) (f)

But for purposes of argument and to cover all potentials raised by Appellant's Jurisdictional Statement, a factual analysis of what the Department did under the Unit Rule and what Pacific Power contended for should be made. Such facts will establish that Pacific Power had one goal and one goal only in this litigation not rising to the dignity of any constitutional issue: reduce the assessment!

The most detailed comparison of what the Department of Revenue did (affirmed by the Montana Supreme Court) versus what Pacific Power claims should have been done is found in Section I, pages 16—46 of the Appellant Department of Revenue's opening brief before the Montana Supreme Court. It is also outlined in the Montana Supreme Court opinion commencing at A19 of the Jurisdictional Statement. In summary the dispute as to how the unit rule is to be implemented is as follows:

a) Revenue Department's Two Stage Method:

I. Make an estimate of total system values by use of three separate indicators of total system values. (Jur. St. A-19)

II. Determine and apply ratio for allocating system values to the Montana segment of the system by determining the economic contributions of such segment to the entire system. (Jur. St. A-20)

The details of each step are important and as to the first step I are as follows:

a. Using Pacific Power's own sworn reports required by statute (84-901 R.C.M. 1947) to be annually provided (the accuracy of which Pacific Power as author has never challenged), total system values were first computed by the "stock and debt method" as being $1,076,198,551.00.

b. Then an entirely separate estimate of total system values was computed from Pacific Power's sworn statement by capitalizing net system income at 8.25 % for the past two years and arriving at total system value of $857,201,842.00.

c. Use cost of system plant from Pacific's annual statement as an indicator of estimated total system values—$1,347,395,000.00.

Since each of the foregoing three indicators arrives at a system value, the assessor is next faced with the problem of how to combine or weight the three—whether by simple averaging or by some form of weighting. At every level in the Montana proceedings the various tribunals (and Pacific Power) approved a "weighting" of the system totals as follows:

> Stock and Debt at 10% (of $1,076,198,551) for $107,619,855.
>
> Capitalized Income at 40% (of $857,201,842) for $342,880,737.
>
> Plant at Cost at 50% (of $1,347,395,000) for $673,697,500.
>
> Total—$1,124,198,092

(Montana's District Court—which adopted Pacific Power's methodology—labeled such weighting percentages "reasonable and proper" (Jur. St. Al3, Finding X) as did the STAB (Jur. St. A5, Finding XVI) which had sided with Pacific Power. And Pacific employs such weights in its own proposed methodology, post.)

The Department of Revenue then totaled the foregoing separate weighted estimates of system values to attain a final, composite estimate of the value of Pacific Power's total system:

> "These values, when totaled, resulted in a composite estimated total value for the Utility's entire interstate electric generating and transmission system of $1,124,198,092."
>
> (Mont. Supr. Ct. Opinion Jur. St. A20)

Stage II also is factually important and was as follows:

a. Follow established Montana law (Jur. St. A-20; A-24) and determine the "economic contribution" of the Montana system segment to the total system. To determine such economic contribution, the Department of Revenue averaged: (1) a comparison of Montana plant cost to total plant cost (1.6%) with (2) a comparison of the revenues generated within Montana to total system revenues (2.37%). Such averaging results in a 2% allocation ratio which is then applied to the composite, weighted system values:

> "The weighted estimate of total system value was multiplied by this 2% figure to obtain the *value* (court's own emphasis) of Montana property of $22,483,962.)
>
> (Jur. St. A20)

Pacific Power's attack on the foregoing was not any attack on any underlying Montana statute or even ostensibly on the unit method of assessment:

> "First of all, the Company (Pacific Power) does not disagree with the unitary method of appraisal properly applied."

STAB Tr. p. 31

"The Company has no quarrel with the use of these three methods as separate indicators of value."

(Mr. Drummond's "Memo", p. 3, STAB Record)

But, as the following implementation (see Appellant's brief before Mont. Sup. Ct. pp. 19-32 for greater detail) of Pacific Power's proposed methodology shows, the foregoing "approval" was wholly tongue in cheek; for Pacific obdurately refuses to recognize that the basic purpose of the unit method is to determine what enhanced values exist for Montana by virtue of Pacific Power's Montana-located properties being a viable and contributing part of the entire Pacific Power system! As long as there is no significant tax bite to an implementation of the unit rule, Pacific Power will give it lip service and feigned "constitutionality". Where meaningful allocation of values based on Montana's contribution to the whole is effected, Pacific Power abandons the unit rule ship and cries "unconstitutional"!

That the foregoing is true is borne out by an analysis of just what Pacific Power successfully urged on Montana's STAB and District Court and what was unraveled, recognized and rejected by Montana's Supreme Court.

Stage I of Pacific Power's Methodology Contentions:

Combine a little of system *values* (steps a through c below) with a lot of Montana

Cost of plant—i.e., add apples and oranges, as follows:

a) Make an estimate of total system values by use of only two indicators of system *value*—i.e., stock and debt and capitalized income just as the Department of Revenue did:

Stock and Debt	= $1,076,198,551
Capitalized Income	= $ 857,201,842

b) Weight those as did the Department of Revenue at 10% and 40% respectively.

Weighted Stock and Debt	= $107,619,855
Weighted Capitalized Income	= $342,880,737

c) Add the weighted estimates above for a weighted estimate of 50% of total system *values of* $450,500,592.

d) Allocate that 50% of system values to Montana based on only a 1.68% comparison of Montana plant cost to total system cost (again discussed under Stage II, post) for $7,568,410.

e) Then since there is admittedly an allocation to Montana of only 50% of total system *values*, fill in the gap and complete the "assessment" by adding in 50% of Montana's historic plant *Cost*. ($11,559,-300) for a d) plus e) total of $19,127,710.

By so combining and allocating 50% of the two most unreliable (and smallest) estimators of system values (weighted only at 10% and 40% by all courts and parties) with 50% of Montana's historic plant cost; and further, (Stage II of allocation) by using

only a comparison of Montana cost of plant with system cost (1.68%) and not giving any weight whatsoever in the allocation ratio to a comparison of what revenues Montana generates for the system (2.37%), Pacific Power solves all of its challenges to the "constitutionality" of Section 84-905 and of the "misuse" of the unit rule and reduces the appraisal of its Montana properties from the Department's $22,483,962 to Pacific Power's $19,127,710!

But as the Montana Supreme Court pointed out to Pacific Power, "values" and "costs" are not synonymous:

> "The Utility urges this Court to hold the actual cost (the 50% of step d), supra) of the physical plant as an appropriate measure of 'value' for assessment purposes and asserts the method utilized by DOR results in an artificial and contrived 'value'. Section 84-401, R.C.M. 1947, requires assessment of property at its 'full cash value'. VALUE DOES NOT EQUAL COST. (emphasis supplied) Western Union Telegraph Co. -vs- Taggart, 163 U.S. 1"
>
> Jur. St. A25
>
> (See also 84-708.1 R.C.M. 1947 requiring assessment of "franchise" values).

The foregoing factual analysis of Pacific Power's contentions sets forth the lawsuit in a nutshell and the sum total of the alleged "constitutional issues." By giving lip service and some weight to unit rule methodology but going to historic cost for the heavy end of the appraisal, Pacific Power hoped to avoid direct confrontation with the line of U.S. Supreme Court cases (supra, page 3) upholding the unit rule concept but still whittle some $3.3 million off its assessment.

Appellee respectfully submits that the foregoing dispute as to methodology poses no undecided federal question whatsoever. Established federal law (supra, P. 3) permits full use of the unit rule to determine and allocate *values* and Pacific Power cites no case or authority that cost must be wholly or partially substituted for allocated value. *Norfolk & Western R.C. -vs- Missouri Tax Com.*, supra page 3, relied upon by appellant doesn't so hold. It affirms the constitutionality of the unit concept. There the tax proceedings were remanded to the Missouri tribunals because in trying to assess the Missouri-oriented rolling stock of the Norfolk road on a comparison of in-state and out-of-state track mileages, Missouri was taxing a portion of the rolling stock which had no connection with Missouri and was oriented to the coal hauling areas of Virginia, West Virginia and Kentucky. A direct parallel is the Montana case of *Western Airlines Inc. -vs- Michunovich*, 149 Mont. 347, 428 P. (2d) 3 (1967) where the Montana Supreme Court held that Montana couldn't allocate "jet values" to the Western Airlines aircraft servicing Montana when, at that time, no jets flew into Montana.

But here the Wyoming and Washington generators specified by Pacific as having been "taxed" by Montana (Jr. St. 4) were physically linked with that portion of the distribution system physicially located in Montana. Electric power surged through Montana lines and both was partially consumed there with appropriate generation of revenue and in part was transported on to other non-Montana consumption points in the system. Acknowledgedly Pacific Power imported generating equipment values INTO Montana for rate-making purposes (Jur. St. 4); acknowledgedly Montana Produced 2.37% of the total system revenues even though the allocation ratio to Montana of system value approved by the Montana Court was only 2% . This isn't either a *Western Airlines* or *Norfolk & Western* situation, and no federal question or constitutional issue is presented. The Department of Revenue's method was logical, consistent and fair. Pacific Power's method was distorted, inconsistent, illogical and warped solely to reduce assessed values!

CONCLUSION

The constitutionality of no Montana statute was in anywise cited, discussed or ruled upon in the Montana proceedings appealed from. The Appellant did not and could not specify where, when, and the manner of the raising of any such constitutional issue. And whether the Jurisdictional Statement be considered as a Title 28, Sec. 1257 (2) appeal or a Section 2103 petition for writ of certiorari, no

substantial federal Question is presented, and Appellee's Motion to Dismiss on each of grounds I and II are meritorious and should be granted.

Respectfully submitted,

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I hereby certify that I served the foregoing MOTION TO DISMISS APPEAL on GERARD K. DRUMMOND attorney for APPELLANT on the day of ,1977, by mailing to him three true and correct copies thereof, certified by me as such. I further certify that said copies were placed in a sealed envelope addressed to the said attorney at 1400 PUBLIC SERVICE BUILDING, PORTLAND, OREGON 97204 which is his regular office address, or his address as last given by him on a document which he has filed in the within entitled cause and served on me: said sealed envelope was then deposited in the United States post office at BUTTE, MONTANA, on the day last above mentioned, with the postage thereon fully paid.

ATTORNEY FOR APPELLEE

Service of the within _____

is hereby accepted in _____, Oregon, this

_____ day of _____, 19____,

by receiving three copies thereof.

_____

Attorney____ for_____

I hereby certify that I served the foregoing _____

on _____

_____

attorney for _____ on the _____ day of

_____, 19____, by mailing to him three true and correct copies

thereof, certified by me as such. I further certify that said copies were placed

in a sealed envelope addressed to the said attorney at _____

_____

which is his regular office address, or his address as last given by him on a

document which he has filed in the within entitled cause and served on me;

said sealed envelope was then deposited in the United States post office at

_____, Oregon, on the day last above

mentioned, with the postage thereon fully paid.

_____

Attorney____ for

In the Supreme Court

of the United States

OCTOBER TERM, 1976

No. 76-1368

PACIFIC POWER & LIGHT COMPANY,
Appellant,

v.

THE DEPARTMENT OF REVENUE OF THE STATE OF MONTANA,
Appellee.

Appeal from the Supreme Court of the State of Montana

APPELLANT'S BRIEF IN OPPOSITION TO APPELLEE'S MOTION TO DISMISS

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APPELLANT'S BRIEF IN OPPOSITION TO APPELLEE'S MOTION TO DISMISS

Appellee's Motion to Dismiss for lack of jurisdiction should be denied. This Court has jurisdiction because the constitutionality of the application of Montana's property tax assessment statute was drawn into question continually throughout the proceedings and the Montana Supreme Court's reversal of the Montana District Court and its rejection of appellant's constitutional arguments resulted in the upholding of the validity of the application of the Montana statute after the issue of its repugnancy to the Constitution

was specifically drawn into question. In *Dahnke-Walker Miller Co.* v. *Bondurant*, 257 U.S. 282, 289 (1921) this Court explained that jurisdiction is proper not only when the validity of a state statute, itself, is drawn into question, but also when the authority exercised under the statute is questioned and when the lower court's decision is in favor of the authority exercised. This is true even if the state court's decision is based on other grounds:

> "That the statute was not claimed to be invalid in toto and for every purpose does not matter. . . . Neither does it matter on what ground the court upheld and enforced the statute. . . . If it be resolved in favor of the validity of the statute, the review may be on writ of error; . . . The provisions take no account of the particular ground or reasons on which the decision is put."

Appellant should not be penalized when it continually raised the constitutional issues, as documented in appellant's Jurisdictional Statement, simply because the Montana Supreme Court wrongfully ignored the constitutional argument. In *New York Ex. Rel. George W. Bryant* v. *Zimmerman*, 278 U.S. 63, 67 (1928) this Court explained:

> "There are various ways in which the validity of a state statute may be drawn in question on the ground that it is repugnant to the Constitution of the United States. No particular form of words or phrases is essential, but only that the claim of invalidity and the ground therefor be brought to the attention of the state court with fair precision and in due time. And if the record as a whole shows either expressly or by clear intendment that this was done, the claim is to be regarded as having been adequately presented.
>
> "Of course, the decision must have been against the claim of invalidity, but it is not necessary that the ruling shall have been put in direct terms. If the necessary effect of the judgment has been to deny the claim, that is enough."

Appellee cites a number of cases which it claims supports its argument that this Court does not have jurisdiction because the constitutionality of appellee's application of the Montana tax assessment statute was not drawn into question. None of the cases cited are applicable to the case at bar. They involve factual situations in which the appellant had failed to raise the constitutional issues in the lower court. In the case at bar, appellant raised the unconstitutionality of appellee's property tax assessment as early as the original hearing before the Montana State Tax Appeal Board as documented in appellant's Jurisdictional Statement.

Appellee next challenges appellant's Jurisdictional Statement by arguing that no substantial federal question is presented, that the Montana Supreme Court judgment rested on an adequate non-federal basis, that the manner in which the constitutional question was raised was not shown and that no federal question has been raised which would permit jurisdiction if the appeal were treated as a petition for writ of certiorari. Appellee does not support these arguments. Instead it attempts to justify its position and its meth-

od of tax assessment by defining the issue as the applicability and constitutionality of the unitary rule method of property tax valuation. Appellee compares its tax assessment method and appellant's method (which was adopted by the Montana State Tax Appeal Board and the Montana District Court) and concludes that its method does not violate the Constitution because it is defined as the unitary method of valuation.

The questions presented in this case are more complex than the validity of the unitary method of valuation. The issues which must be addressed and which have been ignored by both appellee and the Montana Supreme Court, are (1) whether one of three indicators which appellee used to value appellant's Montana property as part of the unitary valuation method is constitutional when that indicator is based on appellant's property outside Montana due to peculiar factual circumstances of appellant's interstate operations and (2) whether allocation of property for ad valorem tax purposes between Montana and other states (which is a question completely separate from the unitary method of valuation) is constitutional.

Appellee argues that appellant attempts to circumvent previous rulings upholding the unitary method of valuation. Appellant's main challenge to the Montana tax assessment, however, is not made against the unitary method of valuation, but rather against the allocation of values *after* such values are established by the unitary method of valuation. It is this *allocation* which the District Court of Montana specifically found to be "at variance with the express goal of the Department [appellee] to assess only that property of respondent

located in Montana." Findings of Fact and Conclusions of Law of the District Court of the State of Montana in and for the County of Lewis and Clark, December 18, 1975.

Once the focus of this case is directed to the actual issues involved, it is clear that appellant has raised the unconstitutionality of appellee's application of the tax assessment statute throughout the proceedings, that the Montana State Tax Appeal Board and the Montana District Court ruled in favor of appellant for the reason that appellee's tax assessment improperly taxed appellant's property outside the State of Montana and that the decision of the Montana Supreme Court necessarily rejected this claim of unconstitutionality by upholding the validity of appellee's application of the Montana tax assessment statute.

For all the reasons outlined above appellee's Motion to Dismiss should be denied.

Respectfully submitted,

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